APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 16, 2009

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Docket Nos. 08-3477-cv(L), 08-3758-cv(XAP).

THE SHIPPING CORPORATION OF INDIA LTD.,

Plaintiff-Counter-Defendant-
Appellant-Cross-Appellee,

v.

JALDHI OVERSEAS PTE LTD.,

Defendant-Counter-Claimant-
Appellee-Cross-Appellant.

Argued: May 5, 2009
Decided: October 16, 2009

Before: FEINBERG, WINTER, and CABRANES Circuit Judges.

JOSÉ A. CABRANES, Circuit Judge:

This case is based on a dispute between a company incorporated in India and a company incorporated in Singapore over an accident that occurred in India while one company was shipping products to China; the

dispute was to be arbitrated in England. Because the parties' banks had accounts in New York banks, electronic fund transfers ("EFTs")[1] between one party

1. We explained the operation of EFTs in *United States v. Daccarett*, 6 F.3d 37, 43-44 (2d Cir. 1993) and paraphrase that explanation here:

> An EFT is nothing other than an instruction to transfer funds from one account to another. When the originator and the beneficiary each have accounts in the same bank that bank simply debits the originator's account and credits the beneficiary's account. When the originator and beneficiary have accounts in different banks, the method for transferring funds depends on whether the banks are members of the same wire transfer consortium. If the banks are in the same consortium, the originator's bank debits the originator's account and sends instructions directly to the beneficiary's bank upon which the beneficiary's bank credits the beneficiary's account. If the banks are not in the same consortium—as is often true in international transactions—then the banks must use an intermediary bank. To use an intermediary bank to complete the transfer, the banks must each have an account at the intermediary bank (or at different banks in the same consortium). After the originator directs its bank to commence an EFT, the originator's bank would instruct the intermediary to begin the transfer of funds. The intermediary bank would then debit the account of the bank where the originator has an account and credit the account of the bank where the beneficiary has an account. The originator's bank and the beneficiary's bank would then adjust the accounts of their respective clients. *See* Amicus Br. 9-11.

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involved in the dispute and third parties passed through New York electronically for an instant. Under *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 278 (2d Cir. 2002), this momentary passage was sufficient to vest jurisdiction in the United States District Court of the Southern District of New York.

We are now presented with the question of whether the rule of *Winter Storm* should be reconsidered and, upon reconsideration, overruled. Specifically, this appeal

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> To more concretely illustrate the circumstances of the instant case, consider the following example: ABC Shipping wants to transfer $ 100 to XYZ Overseas. ABC has an account at India National Bank, and XYZ has an account at Bank of Thailand. India National Bank and Bank of Thailand do not [belong to the same consortium, but each has an account at New York Bank. To begin the transfer, ABC instructs India National Bank to transfer $ 100 to XYZ's account at Bank of Thailand. India National Bank then debits ABC's account and forwards the instruction to New York Bank. New York Bank then debits India National's account and credits Bank of Thailand's account. Bank of Thailand then credits XYZ's account, thereby completing the transfer.
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> We refer to the transferor in an EFT as the "originator" and the transferee as the "beneficiary." References to "a defendant" or "defendants" generally—as opposed to specific references to Jaldhi Overseas Pte Ltd.—indicates the party, whether originator or beneficiary, whose property is the object of a Rule B attachment.

raises the issue of whether EFTs of which defendants are the beneficiary are attachable property of the defendant pursuant to Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Rule B" of "the Admiralty Rules")[2] under our decisions in *Winter Storm*, 310 F.3d at 278, *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 436 (2d Cir. 2006), and *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104, 109 (2d Cir. 2008). We now conclude, with the consent of all of the judges of the Court in active service, that *Winter Storm* was erroneously decided and therefore should no longer be binding precedent in our Circuit.[3]

Our decision in Winter Storm produced a substantial body of critical commentary. Indeed, within four years

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2. Rule B(1)(a) of the Admiralty Rules states, in relevant part:

> If a defendant is not found within the district, when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.

Fed. R. Civ. P. Supp. R. B(1)(a).

3. For clarity, we pause to note that HN3Go to the description of this Headnote.by overturning Winter Storm, we also abrogate any decision insofar as it has relied on *Winter Storm*, specifically, *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008).

of our decision, we ourselves had begun to question the correctness of *Winter Storm*, *see Aqua Stoli*, 460 F.3d at 445 n.6 ("The correctness of our decision in Winter Storm seems open to question . . . ."), as have, more recently, some judges of the United States District Court for the Southern District of New York, *see e.g.*, *Hannah Bros. v. OSK Mktg. & Commc'ns, Inc.*, 609 F. Supp. 2d. 343, 352 n.3 (S.D.N.Y. 2009) ("The discussion above also underscores a point that has become conventional wisdom in this district—that *Winter Storm* and *Aqua Stoli* may merit reconsideration . . . ." (emphasis added)). Various commentators and courts have suggested that Winter Storm directly led to strains on federal courts and international banks operating within our Circuit. *See, e.g.*, Permanent Editorial Bd. for the Uniform Commercial Code, PEB Commentary No. 16: Sections 4A-502(d) and 4A-503, at 5 n.4 (July 1, 2009) ("PEB Commentary") ("[T]he Winter Storm approach is proving to be practically unworkable."). And some have even suggested that *Winter Storm* has threatened the usefulness of the dollar in international transactions. *See generally id.* ("[T]his explosion of writs creates an additional threat to the U.S. dollar as the world's primary reserve currency and New York's standing as a center of international banking and finance."); *see also* Lawrence W. Newman & David Zaslowsky, *Is There Finally a Backlash Against Rule B Attachments?*, 241 N.Y. L.J. 3 (2009) ("[W]hen lawyers are advising their clients that the best way to avoid Rule B attachments is to conduct maritime and perhaps other transactions in a currency other than U.S. dollars, there are emerging risks of a significant reduction in the use

of the dollar as the dominant currency of international commerce.").

The unforeseen consequences of *Winter Storm* have been significant. According to *amicus curiae* The Clearing House Association L.L.C.—whose members are ABN AMRO Bank N.V.; Bank of America, National Association; The Bank of New York Mellon; Citibank, National Association; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; UBS AG; U.S. Bank National Association; and Wells Fargo Bank, National Association—from October 1, 2008 to January 31, 2009 alone "maritime plaintiffs filed 962 lawsuits seeking to attach a total of $ 1.35 billion. These lawsuits constituted 33% of all lawsuits filed in the Southern District, and the resulting maritime writs only add to the burden of 800 to 900 writs already served daily on the District's banks." Amicus Br. 3-4. Judge Scheindlin recently outlined the effect of *Winter Storm* on international banks located in New York:

> This Court was recently informed that, currently, leading New York banks receive numerous new attachment orders and over 700 supplemental services of existing orders each day. This is confirmed by the striking surge in maritime attachment requests in this district, which now comprise approximately one third of all cases filed in the Southern District of New York. As a consequence, New York banks have hired additional staff, and

> suffer considerable expenses, to process the attachments. The sheer volume . . . leads to many false "hits" of funds subject to attachment, which has allegedly introduced significant uncertainty into the international funds transfer process.

Cala Rosa Marine Co. Ltd. v. Sucres et Deneres Group, 613 F. Supp. 2d 426, 431-32 n.7 (S.D.N.Y. 2009) (citation omitted).

Our holding in *Winter Storm* not only introduced "uncertainty into the international funds transfer process," *id.*, but also undermined the efficiency of New York's international funds transfer business. As the Federal Reserve Bank of New York noted in its amicus curiae brief in support of the motion for rehearing en banc by the defendant in *Winter Storm*, "efficiency is fostered by protecting the intermediary banks; justice is fostered by expressly telling litigants where the process should be served. . . . [*Winter Storm*] disrupt[ed] this balance and threaten[ed] the efficiency of funds transfer systems, perhaps including Fedwire." Amicus Br. of Federal Reserve Bank of New York 9, *Winter Storm*, 310 F.3d 263 (No. 02-7078). Undermining the efficiency and certainty of fund transfers in New York could, if left uncorrected, discourage dollar-denominated transactions and damage New York's standing as an international financial center. *See, e.g.*, PEB Commentary 6 n.4 ("*Winter Storm* and its progeny have had a far greater, and damaging, potential impact

on U.S. and foreign banks located in New York than might have been anticipated."); Newman & Zaslowsky, 241 N.Y. L.J. at 3.

Overturning *Winter Storm* will dramatically affect the law of maritime attachments in our Circuit, but we must not overstate the practical effect of our holding in this case. Since we decided *Winter Storm*, decisions in both our Court and in the Southern District of New York have cabined *Winter Storm* to minimize its effects on the courts and banks of New York without overturning Winter Storm directly. *See, e.g.*, *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 133 (2d Cir. 2009); *Cala Rosa*, 613 F. Supp. 2d at 432; *Marco Polo Shipping Co. Pte v. Supakit Prods. Co.*, No. 08 Civ. 10940, 2009 U.S. Dist. LEXIS 19057, at *4 (S.D.N.Y. Mar. 4, 2009). Although these cases have further complicated the law of Rule B attachments, they have also limited the reach of *Winter Storm* and thus necessarily limited the effect of our decision in the instant case.

In *STX Panocean*, we recently held that by merely registering as a domestic corporation with the New York Secretary of State, a defendant is "found" within the district for the purposes of Rule B attachment. 560 F.3d at 133. Because Rule B provides for attachment of defendant's property that is found within the district *only if* the defendant itself is *not* found within the district, our ruling in *STX Panocean* allows an international firm to avoid having its property—including property other than EFTs—attached simply

by registering as a domestic corporation in New York State. Although the implications of *STX Panocean* are unknown, it would not be surprising if many international firms that engage in dollar-denominated transactions register in New York State to avoid attachment of their property.

In *Cala Rosa*, Judge Scheindlin denied a maritime plaintiff's request for "continuous service" of an attachment on banks—a decision that, if upheld on appeal, would likely further limit the usefulness of attachments of EFTs. 613 F. Supp. 2d at 432. In light of our decision in *Reibor International Ltd. v. Cargo Carriers Ltd.*, 759 F.2d 262, 266 (2d Cir. 1985), which held that an attachment is void unless a garnishee actually "possesses" defendant's property when the attachment is served, and the instantaneous nature of most EFTs, Judge Scheindlin's decision renders many maritime attachments effectively unenforceable. As Judge Scheindlin explained:

> Many courts, including this one, have noted that in light of Reibor a continuous service provision is necessary, in practice, to allow attachment of EFTs. That is no doubt true. But Reibor provides the proper response to this concern: the New York "rule works, to be sure, to the detriment of an attaching creditor, but that is simply the way the law was intended to operate."

> Many courts have also expressed concern that in the absence of a continuing service provision, plaintiffs will post process servers at bank offices around the clock in an attempt to capture EFTs at the precise moment of their arrival. I agree that this is likely and that this would be highly disruptive to New York banks. Accordingly, I decline to specially appoint any plaintiff-designated process servers. As a result, pursuant to Rule B(1)(d)(ii), I authorize only the United States Marshals to serve the process and any supplemental process.
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> Plaintiff expresses concern that this will impose an undue burden on the United States Marshals. Plaintiff's concern, though appreciated, is overstated: nothing requires the Marshals to repetitively serve the banks with attachment orders around the clock. Further, plaintiff's duty to bear the costs of Marshal-served processes will help limit the Marshals' workload.

Cala Rosa, 613 F. Supp. 2d at 432 (footnotes omitted) (quoting *Reibor*, 759 F.2d at 268). A Circuit-wide decision rejecting a continuous service provision in the case of the attachment of EFTs would arguably limit the reach of *Winter Storm*.

Finally, in *Marco Polo*, Judge Koeltl recently required a "plausible" showing that defendant's funds

were actually passing through Southern District of New York, as opposed to hypothetically passing through the Southern District. *See* 2009 U.S. Dist. LEXIS 19057, at *4. Judge Koeltl noted that "[t]he fact that the defendant is still actively doing business and at some point in the past has conducted its business in United States dollars may mean that the defendant could transfer funds through a New York bank in the future, but it hardly makes it plausible that it actually will." *Id.* at *5. By requiring more than a hunch to obtain an attachment, Judge Koeltl further limited the usefulness of attachment of EFTs sanctioned by *Winter Storm.*

Taken together, these cases may have limited the practical usefulness of our holding in Winter Storm to plaintiffs and thus may also have reduced the practical effects of overturning that decision. This is not to say that we take our decision to overturn Winter Storm lightly but, rather, that we seek to allay any concerns that the decision in this case is wholly unanticipated, surprising, or disruptive to ongoing financial practices. In doing so, we recognize a trend toward limiting maritime attachments of EFTs in our Circuit and take this opportunity to definitively untangle the doctrinal knot created by Winter Storm and its progeny.

BACKGROUND

In this action, plaintiff The Shipping Corporation of India, Ltd. Click for Enhanced Coverage Linking Searches ("SCI" or "plaintiff") appeals from a June 27, 2008 order of the United States District Court for the

Southern District of New York (Jed S. Rakoff, *Judge*) insofar as it vacated portions of an order of maritime attachment and garnishment (the "attachment") entered by the District Court on May 7, 2008, pursuant to Rule B. Specifically, the June 2008 order vacated the attachment of EFTs sent from third parties not involved in this litigation to defendant Jaldhi Overseas Pte Ltd. ("Jaldhi" or "defendant") in the amount of $ 3,533,522.

Jaldhi cross-appeals from the same June 27, 2008 order insofar as it denied Jaldhi's motion for counter-security for various counterclaims to be arbitrated in London on the ground that SCI, as an alleged instrumentality of the government of India, was entitled to immunity from pre-judgment attachment under the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602-1611 ("FSIA").

On appeal, the parties raise the following issues: (1) whether EFTs of which a defendant is the beneficiary are attachable property of that defendant under our decisions in *Winter Storm*, 310 F.3d 263, *Aqua Stoli*, 460 F.3d 434, and *Consub Delaware*, 543 F.3d 104; and (2) whether SCI is entitled to immunity under the FSIA from pre-judgment attachment of security for Jaldhi's counterclaims to be arbitrated in London.

The relevant factual and procedural history is as follows. In March 2008, SCI chartered its vessel *M/V Rishikesh* (the "vessel") to defendant to transport iron

ore from India to China.[4] Specifically, the charter provided that SCI was to deliver the vessel to Jaldhi on March 29, 2008, "with hull, machinery, and equipment in a thoroughly efficient state." The vessel was delivered to Jaldhi on March 29, 2008, in compliance with the terms of the charter. While in port in Kolkata, India the next day, a crane on board the vessel collapsed, killing the crane operator, halting cargo operations, and causing Jaldhi to place the vessel "off hire," *i.e.*, to suspend the charter.

On May 2, 2008, SCI issued an invoice to Jaldhi seeking payment of Jaldhi's unpaid balance of $3,608,445. After not receiving payment, SCI filed a complaint in the District Court seeking an *ex parte* maritime attachment pursuant to Rule B of the Admiralty Rules on May 7, 2008 for the balance, interest, and attorneys' fees for a total of $4,816,218. According to SCI, the vessel came back "on hire" on April 13, 2008, when its cranes passed safety inspections, and therefore Jaldhi owes payments under the charter from that date forward. On May 8, 2008, the District Court entered an ex parte order of Maritime Attachment and Garnishment in the amount of $4,816,218 and noted in its order that the attachment applied

> against all tangible or intangible property belonging to, claimed by or being held for the

4. Although the charter commits the parties to resolve any disputes under English law and by arbitration in London, it is unclear from the record and briefs whether any arbitrations in London were commenced or are ongoing.

> Defendant by any garnishees within this District, including but not limited to electronic fund transfers originated by, payable to, or otherwise for the benefit of Defendant, whether to or from the garnishee banks or any other electronic funds transfers . . . .

J.A. 15. SCI then filed an amended complaint on May 15, 2008, to adjust the amount attached to reflect additional fees and a $ 1,260,585 payment from Jaldhi to SCI, bringing the total attachment to $4,689,247. On May 22, 2008, Jaldhi filed a motion to vacate the attachment pursuant to Rule E of the Admiralty Rules[5] and sought counter-security against SCI to cover any damages resulting from the crane accident. By that date, SCI had attached EFTs in the amount of $4,873,404.90. EFTs where defendant was the beneficiary comprised $ 4,590,678.60 of the total amount attached, with the remainder consisting of EFTs where

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5. Rule E of the Admiralty Rules states, in relevant part:

> Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules.

Fed. R. Civ. P. Supp. R. E(4)(f).

defendant was the originator.[6] The parties then worked together to release any funds attached in excess of the amount provided in the attachment order.

In a Memorandum Order dated June 27, 2008, Judge Rakoff vacated his May 8, 2008 attachment order insofar as it applied to EFTs of which defendant was the beneficiary. *See Shipping Corp. of India, Ltd. v. Jaldhi Overseas PTE Ltd.*, No. 08 Civ. 4328, 2008 U.S.

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6. Specifically, EFTs from and to the following parties were seized while they briefly passed through the computer systems of banks located in the Southern District of New York:

Originator	*Beneficiary*	*Amount Restrained*
Sesa Goa Ltd.	Jaldhi Overseas Ltd.	$ 2,377,533.90
Sarat Chatterjee & Co.	Jaldhi Overseas Ltd.	$ 1,399,960.00
Sarat Chatterjee & Co.	Jaldhi Overseas Ltd.	$ 449,960.00
Sarat Chatterjee & Co.	Jaldhi Overseas Ltd.	$ 269,363.72
Bhusan Power & Steel Ltd.	Jaldhi Overseas Ltd.	$ 93,861.00
		$ 4,590,678.60
Jaldhi Overseas Ltd.	Bridge Oil Ltd.	$ 282,726.35
	Total	$ 4,873,404.90

J.A. 32.

Dist. LEXIS 49209, at *5 (S.D.N.Y. June 27, 2008). Judge Rakoff based his decision to vacate the attachment order on his own prior decision in *Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.*, 461 F. Supp. 2d 222 (S.D.N.Y. 2006), in which he had concluded that EFTs en route to a defendant were not attachable under Rule B. *See Shipping Corp. of India*, 2008 U.S. Dist. LEXIS 49209, at *1-2. He also concluded that SCI was entitled to sovereign immunity under the FSIA, although he did not make any specific findings regarding SCI's sovereign status. *Id.* at * 3. Noting, however, that there were differing opinions among judges of the Southern District of New York regarding the attachment of EFTs where the defendant is the beneficiary of the transfer, Judge Rakoff certified the matter for appellate review pursuant to 28 U.S.C. § 1292(b).[7] *Id.* at *2-3 ("Because

7. This statute states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided*, however, That application for an appeal hereunder shall not stay

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the determination to vacate the attachment clearly involves a controlling question of law as to which there is substantial ground for difference of opinion, and because an immediate appeal from the order may materially advance the ultimate termination of the litigation, the Court hereby certifies the vacatur for interlocutory appeal . . . ." (internal quotation marks and citation omitted)).

DISCUSSION

A. Standard of Review

We generally review a district court's decision to vacate a maritime attachment for "abuse of discretion." *See, e.g., Consub Del.*, 543 F.3d at 108; *cf. Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) ("A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." (internal quotation marks, citation, and alterations omitted) (emphasis added)). Because the District Court made a threshold ruling of law before exercising its discretion, our review is *de novo*. *See Aqua Stoli*, 460 F.3d at 439.

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> proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

B. EFTs as Attachable Property

Rule B of the Admiralty Rules permits attachment of "the defendant's tangible or intangible personal property." Fed. R. Civ. P. Supp. R. B(1)(a).[8] From a plain reading of the text, it is clear that to attach an EFT under Rule B, the EFT must both (1) be "tangible or intangible property" and (2) be the "defendant's." *Id.*

Before we can reach the question presented squarely in this appeal—whether an EFT is defendant's property when defendant is the beneficiary of that EFT—we must first consider the threshold issue of whether EFTs are indeed "defendant's" property subject at all to attachment under the Admiralty Rules. We first held that EFTs were in fact attachable property under Rule B seven years ago in Winter Storm. Although we have subsequently applied Winter Storm in numerous cases, *see, e.g., Consub Del.*, 543 F.3d 104; *Aqua Stoli*, 460 F.3d 434, we now conclude, as noted earlier, that Winter Storm was erroneously decided and should no longer be binding precedent in this Circuit.

We readily acknowledge that a panel of our Court is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court," *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004), and thus that it would ordinarily be neither appropriate nor

8. For a brief overview of the history and purpose of maritime attachments, *see Aqua Stoli*, 460 F.3d at 437-38.

possible for us to reverse an existing Circuit precedent. In this case, however, we have circulated this opinion to all active members of this Court prior to filing and have received no objection. *See, e.g., United States v. Crosby*, 397 F.3d 103, 105 n.1 (2d Cir. 2005); *Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 268 n.9 (2d Cir. 1997).[9]

Our reasons for reversing a relatively recent case are twofold. First, and most importantly, we conclude that the holding in *Winter Storm* erroneously relied on *Daccarett*, 6 F.3d 37, to conclude that EFTs are attachable property. *Winter Storm*, 310 F.3d at 276-78. Second, as noted above, the effects of *Winter Storm* on the federal courts and international banks in New York are too significant to let this error go uncorrected simply to avoid overturning a recent precedent.

Beginning in Winter Storm, we have held that "EFT funds in the hands of an intermediary bank" are "subject to Admiralty Rule B attachment." *Id.* at 278. In that case, plaintiff sought to attach an EFT that originated in defendant's account with the Bank of Ayudhya—based in Bangkok, Thailand—while it was en route to a third party who maintained an account with the Royal

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9. We refer to this process as a "mini-en banc." *See United States v. Parkes*, 497 F.3d 220, 230 n.7 (2d Cir. 2007); *see also* Jon O. Newman, *The Second Circuit Review—1987-1988 Term: Foreword: In Banc Practice in the Second Circuit, 1984-1988*, *55 Brook. L. Rev 355, 367-68 (1989)* (noting that judges will occasionally circulate particularly important panel opinions before filing).

Bank of Scotland in London. *Id.* at 266. The EFT passed through the Bank of New York—the "intermediary bank"—which is headquartered in Manhattan. *Id.* The District Court vacated the attachment of the EFT because, in its view, the EFT was not "property" within the meaning of Rule B. *Id.* at 267. Specifically, she concluded that there was no federal law on point and that state law—New York's version of the Uniform Commercial Code—forbade courts from attaching funds in an intermediary bank. *See id.*; *see also* N.Y. U.C.C. § 4-A-503.

On appeal, a panel of our Court concluded that relevant federal law indicated that EFTs were indeed "property" that could be attached in a Rule B proceeding and therefore recourse to state law was unnecessary. *Winter Storm*, 310 F.3d at 278. In a comprehensive opinion, Judge Haight, sitting by designation, offered three reasons to support this decision.

First, the panel observed that Rule B itself—which covers "defendant's tangible or intangible personal property," Fed. R. Civ. P. Supp. R. B(1)(a)—is written in very broad language. "It is difficult to imagine words more broadly inclusive than 'tangible or intangible.' . . . The phrase is the secular equivalent of the creed's reference to the maker 'of all there is, seen and unseen.'" *Winter Storm*, 310 F.3d at 276. This broad language, the panel reasoned, sweeps sufficiently far to encompass even ephemeral EFTs.

Second, the panel stated that "[t]here is no question that federal admiralty law regards a defendant's bank account as property subject to maritime attachment under Rule B." *Id.* (emphasis added). By extension, the panel reasoned, "[we are un]able to discern in admiralty law or elsewhere a basis for regarding [the defendant's] funds in [the intermediary bank's] hands prior to their electronic transfer to [the beneficiary] as anything other than the funds held by [the intermediary bank] for the account of [the defendant]." *Id.* Since a defendant's bank account was attachable property, the panel reasoned, the effectively equivalent EFTs should also be attachable property of the defendant.

Third, the panel observed that in *Daccarett* we had upheld the seizure of EFTs that passed through intermediary banks in New York City, where the EFTs were used by a Colombian criminal cartel to transfer funds from accounts in Luxembourg to accounts in Panama and Colombia. 6 F.3d at 44, 54; *see also id.* at 55 (holding that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res under the forfeiture statutes"). The seizures in that criminal case were made pursuant to 21 U.S.C. § 881, a penal statute which borrows the procedures for asserting maritime liens under Admiralty Rule C.[10] The

10. 21 U.S.C. § 881 states, in relevant part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

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panel reasoned that there was "no principled basis" for applying the procedures outlined in Admiralty Rule C to a seizure of an EFT in a forfeiture action, but not to a maritime attachment under Rule B. *Winter Storm*, 310 F.3d at 278.

Relying on these three reasons—each of which was based on federal law—the Winter Storm panel concluded that "EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a)." *Id.* Accordingly, the panel had no occasion to look to state

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> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.
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> 21 U.S.C. § 881(a)(6); see also id. § 881(b) (requiring property to be seized "in the manner set forth in [18 U.S.C. § 981(b)]"); 18 U.S.C. § 981(b)(2)(A) (permitting a seizure without a warrant where "a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims").

law, as Judge Scheindlin had done, to determine whether EFTs were attachable.[11] *Id.*

Upon further consideration, we find Winter Storm's reasons unpersuasive and its consequences untenable. Most importantly, we find that *Winter Storm*'s reliance on Daccarett was misplaced. *Daccarett* did not decide that the originator or beneficiary of an EFT had a property interest in the EFT; it held only that funds traceable to an illegal activity were subject to forfeiture under 21 U.S.C. § 881. *See Aqua Stoli*, 460 F.3d at 445 n.6 ("Because Daccarett was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of whose assets they are while in transit."). Under the forfeiture laws, funds can be seized even if they do not constitute property of the defendant because "no property right shall exist in . . . [all] moneys . . . traceable to [a violation of Title 21, Chapter 13, Subchapter I of the United States Code]." 21 U.S.C. § 881(a). To be eligible for forfeiture, the EFTs needed only to be traceable to the illegal activities, and thus the court in Daccarett was required only to assess whether the EFTs in that case were in fact traceable to illegal activities. No further inquiry into the identity of the owner of the EFTs was necessary—indeed, that question was wholly irrelevant.

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11. Although the panel did briefly discuss New York law, it concluded that New York law was not controlling because federal law—particularly *Daccarett*—adequately defined the contours of Rule B. *See Winter Storm*, 310 F.3d at 279.

For maritime attachments under Rule B, however, the question of ownership is critical. As a remedy quasi in rem, the validity of a Rule B attachment depends entirely on the determination that the res at issue is the property of the defendant at the moment the res is attached. *See, e.g., Transportes Navieros y Terrestres S.A. de C.V. v. Fairmount Heavy Transp. N.V.*, 572 F.3d 96, 108 (2d Cir. 2009). Because a requirement of Rule B attachments is that the defendant is not "found within the district," the res is the only means by which a court can obtain jurisdiction over the defendant.[12] If the res is not the property of the defendant, then the court lacks jurisdiction. In contrast, civil forfeiture is a remedy in rem. In rem jurisdiction is based on the well-established theory that the "thing is itself treated as

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12. The "jurisdiction" at issue in a Rule B attachment proceeding is quasi in rem, rather than *in personam* or *in rem*. In Rule B attachment proceedings, jurisdiction is predicated on the presence within the court's territorial reach of property in which the Rule B defendant has an interest. *See Black's Law Dictionary* 857 (7th ed. 1999) (defining *quasi in rem* as "[j]urisdiction . . . based on [a] person's interest in property located within the court's territory"); *see also* Restatement (Second) of Judgments § 6 cmt. a, at 73; *id.* § 8 cmt. a, at 83–84. Because of the requirement that the defendant not be "found" within the district where the action is brought, Fed. R. Civ. P. Supp. R. B(1)(a), Rule B contemplates that a court will lack in personam jurisdiction over the defendant when it orders that a writ of attachment be issued. In such a proceeding, the court's coercive authority is coterminous with the scope of its jurisdiction, and limited to the extent of the defendant's interest in the attached property; that authority does not extend to the exercise of *in personam* jurisdiction over a Rule B defendant.

the offender and made the defendant by name or description." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501, 118 S. Ct. 1464, 140 L. Ed. 2d 626 (1998). Thus, for in rem remedies such as forfeitures, ownership of the res is irrelevant, as the court has personal jurisdiction regardless of who owns the res at issue. Although not considered by the *Winter Storm* panel, this distinction provides, in our view, a principled basis for allowing EFTs to be subject to forfeiture but not attachment. In sum, Daccarett provides no persuasive guidance on the validity of Rule B attachments of EFTs and should not serve as the foundation for a rule that allows the attachment of EFTs under Rule B.

Without the support of *Daccarett*, HN9Go to the description of this Headnote.we are unpersuaded that either the text of Rule B or our past maritime holdings relating to defendants' bank accounts compel us to conclude as a matter of federal law that an EFT is "*defendant's* . . . personal property." Fed. R. Civ. P. Supp. R. B(1)(a) (emphasis added). Moreover, we are unaware of any historical rationale that justifies the extension of federal maritime common law to support the Rule B practices that have taken place under the rule of *Winter Storm*. One of the primary grounds for the historical development of Rule B attachments was that "[a] ship may be here today and gone tomorrow." *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 637 (9th Cir. 1982); *see also Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion*, 732 F.2d 1543, 1547 (11th Cir. 1984) (noting that a "relevant commercial . . . consideration[]" relating to Rule B practices is that

"a ship's ability to dock, unload cargo, and fill its hold with goods intended for another destination—all within twenty four hours—imposes tremendous pressure on creditors desiring to attach a vessel or property located aboard"). EFTs, like ships in a port, are transitory. Streamlined Rule B practices, however, developed out of the concern that ships might set sail quickly, not because the courts intended to arm maritime plaintiffs with writs of attachment prior to the arrival of the ship in port. Under Winter Storm, however, maritime plaintiffs now seek writs of attachment pursuant to Rule B long before the defendant's property enters the relevant district, often based solely on the speculative hope or expectation that the defendant will engage in a dollar-denominated transaction that involves an EFT during the period the attachment order is in effect. *See, e.g., TJ Shipping & Logistics v. Havi Ocean, LLC*, No. 09 Civ. 1555, 2009 U.S. Dist. LEXIS 14870, 2009 WL 454137, at *2-3 (S.D.N.Y. Feb. 19, 2009). Such practices, which have increased dramatically since *Winter Storm*, bear little, if any, relation to the text of Rule B or to our jurisprudence relating to the bank accounts of maritime defendants.

When there is no federal maritime law to guide our decision, we generally look to state law to determine property rights. *See, e.g., Reibor*, 759 F.2d at 266 (citing *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982)) (considering state law where federal admiralty law is "thin" and "a decision . . . contrary to the general rule of the state might have disruptive consequences for the

state banking system" (internal quotation marks omitted)). Accordingly, we now look to state law to determine whether EFTs can be considered a "defendant's" property for purposes of attachment under Rule B.

New York State does not permit attachment of EFTs that are in the possession of an intermediary bank. Specifically, New York law states that HN12Go to the description of this Headnote."a court may restrain . . . the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds." N.Y. U.C.C. § 4-A-503; *see also id.* § 4-A-503 cmt. 1 ("After the funds transfer is completed by acceptance of a payment order by the beneficiary's bank, [the beneficiary's] bank can be enjoined from releasing funds to the beneficiary or the beneficiary can be enjoined from withdrawing funds.").

As for those interested in obtaining the originator's funds, New York law is also clear. Specifically, a court may restrain . . . an originator's bank from executing the payment order of the originator." *Id.* § 4-A-503; *see also id.* § 4-A-502 cmt. 4 ("A creditor of the originator can levy on the account of the originator in the originator's bank before the funds transfer is initiated. . . . The creditor of the originator cannot reach any other funds because no property of the originator is being transferred." (emphases added)). Apart from these injunctions, "[a] court may not otherwise restrain [any activity] with respect to a funds transfer." *Id.* § 4-A-503;

see also European Am. Bank v. Bank of N.S., 12 A.D.3d 189, 784 N.Y.S.2d 99, 100-01 (1st Dep't 2009) (noting that attachments served on intermediary banks cannot be enforced); N.Y. U.C.C. § 4-A-503 cmt. 1 ("No other injunction is permitted. In particular, intermediary banks are protected. . . ." (emphases added)).

Finally, an authoritative comment accompanying the New York Uniform Commercial Code states that a beneficiary has no property interest in an EFT because "until the funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, *the beneficiary has no property interest in the funds transfer* which the beneficiary's creditor can reach." N.Y. U.C.C. § 4-A-502 cmt. 4 (emphasis added); *cf. Sigmoil Res., N.V. v. Pan Ocean Oil Corp. (Nigeria)*, 234 A.D.2d 103, 650 N.Y.S.2d 726, 727 (1st Dep't 1996) ("Neither the originator who initiates payment nor the beneficiary who receives it holds title to the funds in the account at the correspondent bank."). Taken together, these provisions of New York law establish that EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank.

Because EFTs in the temporary possession of an intermediary bank are not property of either the originator or the beneficiary under New York law, they cannot be subject to attachment under Rule B. As stated earlier, Rule B allows attachment only of "defendant's . . . property." Fed. R. Civ. P. Supp. R. B(1)(a) (emphasis added). If the EFTs are not the property of either the

originator or the beneficiary, then they cannot be "defendant's . . . property" and therefore are not subject to Rule B attachment.[13]

In sum, because there is no governing federal law on the issue and New York law clearly prohibits attachment of EFTs, we conclude that EFTs being processed by an intermediary bank in New York are not subject to Rule B attachment. Accordingly, we conclude that the District Court did not err in vacating the portions of the order in this action affecting EFTs of which defendant was the beneficiary. We remand the cause to the District Court with directions to consider whether there are grounds for not vacating the remaining portions of the attachment order affecting EFTs of which defendant was the originator.

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13. If it is argued that property rights must vest in some entity at all times, then perhaps New York law envisages EFTs as the property of the intermediary bank for the short while or instant during which they remain in the bank's possession. Because this question is not presented in this case, we need not address it here. If, however, a court were to find that the EFTs were property of the intermediary bank, it would have no effect on the application of Rule B. If EFTs are the property of the intermediary bank and that bank is a defendant for purposes of Rule B, then the property would still not be subject to Rule B attachment because these intermediary banks are necessarily "found within the district" in which the EFTs are found and Rule B only allows the attachment of property within the district that belongs to defendants "not found within the district." Fed. R. Civ. P. Supp. R. B(1)(a).

C. Sovereign Immunity

Because it is probable that on remand the District Court will vacate the May 8, 2008 attachment order in its entirety, we decline to consider the second argument on appeal—whether the District Court erred in denying Jaldhi's motion for counter-security on the ground that SCI was a sovereign instrumentality. Without briefing before us on the issue, we leave it to the District Court to determine if Jaldhi's motion for counter-security should be denied as moot. If it is not moot, the District Court is directed to give plenary reconsideration to the claim of sovereign immunity made by SCI, with such jurisdictional discovery as may be appropriate in the circumstances. *See generally First City, N.A. v. Rafidain Bank*, 150 F.3d 172, 176-77 (2d Cir. 1998) [G]enerally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue [in actions where FSIA applies.]" (internal quotation marks omitted)).

CONCLUSION

In summary, we hold the following:

(1) We overrule our previous decision in Winter Storm, 310 F.3d 263, and conclude that EFTs being processed by an intermediary banks are not subject to attachment under Rule B.

(2) In accordance with our conclusion that such EFTs are not subject to attachment, we AFFIRM the June 27, 2008 order of the District Court insofar as it

vacated the portions of the May 8, 2008 attachment order that affect EFTs of which defendant is the beneficiary and we REMAND the cause to the District Court with directions to consider whether there are other grounds for not vacating the remaining portion of the attachment order that affects EFTs of which defendant is the originator.

(3) Finally, we VACATE the June 27, 2008 order of the District Court insofar as it denied Jaldhi's motion for counter-security and REMAND the cause to the District Court to consider whether to dismiss that motion.

The mandate shall issue forthwith. Each party shall bear its own costs.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED JUNE 27, 2008

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 08 Civ. 4328 (JSR)

THE SHIPPING CORPORATION OF INDIA, LTD.,

Plaintiff,

-v-

JALDHI OVERSEAS PTE LTD.,

Defendant.

June 27, 2008

MEMORANDUM ORDER

JED S. RAKOFF, District Judge.

In this maritime action, defendant Jaldhi Overseas PTE Ltd. ("Jaldhi") moves (1) to vacate those portions of the attachment of property by plaintiff The Shipping Corporation of India, Ltd. ("SCI") that consist of those electronic funds transfers ("EFTs") from third parties of which Jaldhi was the intended beneficiary but not yet the recipient, and (2) for counter-security for any putative recovery by Jaldhi on Jaldhi's counterclaims

against SCI. For the reasons set forth below, Jaldhi's motion to vacate portions of SCI's attachment is granted, but the vacatur is stayed for 90 days so that SCI can pursue interlocutory appeal; and Jaldhi's motion for counter-security is denied.

As this Court has previously explained, an attachment pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims only applies to a defendant's property, and EFTs directed by third parties to a defendant do not become the defendant's property until the transfer is completed. *See Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.*, 461 F. Supp. 2d 222 (S.D.N.Y. 2006). Hence, those EFTs from third parties that were attached before the transfer to the intended beneficiary, Jaldhi, had been completed cannot be attached pursuant to Rule B, and their attachment must be vacated.

Recognizing that this outcome was likely in light of *Seamar*, a decision of this Court with which some other courts have disagreed, *see Compania Sudamericana de Vapores S.A. v. Sinochem Tianjin Co.*, No. 06 Civ. 13765, 2007 U.S. Dist. LEXIS 24737, 2007 WL 1002265, *4 (S.D.N.Y. Apr. 4, 2007) (collecting cases), SCI's counsel, at oral argument of this motion, *see* transcript, 6/25/08, requested that the Court, if it granted vacatur, certify the case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stay the vacatur pending such appeal. Because the determination to vacate the attachment clearly "involves a controlling question of law as to which there is substantial ground for difference

of opinion," and because "an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), the Court hereby certifies the vacatur for interlocutory appeal and stays the vacatur for 90 days so that plaintiff can pursue such an appeal on an expedited basis.

As to Jaldhi's motion for counter-security, however, the Court denies the motion because SCI has immunity from pre-judgment attachment under the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602-1611.

SCI asserts that it is an instrumentality of the Government of India, *see, e.g., Williams v. The Shipping Corp. of India*, 653 F.2d 875, 876 (4th Cir. 1981), and hence entitled to immunity from suit except to the extent waived. SCI admits that, by bringing this action, it has waived its immunity from counterclaims, at least in the circumstances here presented. *See* § 1607(b)-(c); transcript, 6/25/08.

The Second Circuit, however, treats pre-judgment security for claims against a sovereign as a form of "attachment." *See, e.g., British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 212 F.3d 138, 141-42 (2d Cir. 2000); *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1229-30 (2d Cir. 1995). 28 U.S.C. § 1609 grants immunity from attachment to a sovereign instrumentality, subject only to the exceptions set forth in 28 U.S.C. §§ 1610 and 1611. But the only such exception to pre-judgment attachment predicated on waiver requires that such waiver be made "explicitly." § 1610(d)(1). Unlike a waiver

of a foreign state's immunity from attachment in aid of execution, which can be waived implicitly, "the immunity from *prejudgment attachment* [under § 1610(d)] can be waived only by *unmistakable and plain language.*" *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 416 (2d Cir. 1983) (second emphasis added). "[A] waiver of immunity from prejudgment attachment must be explicit in the common sense meaning of that word: 'the asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from prejudgment attachment in this country.'" *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 261 (2d Cir. 2003) (quoting *S&S Mach.*, 706 F.2d at 416); *see also Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, 676 F.2d 47, 49 (2d Cir. 1982). Neither SCI's susceptibility to counterclaims under § 1607 nor SCI's attachment of Jaldhi's funds amounts to an "unmistakable," "clear and unambiguous" waiver of SCI's immunity to pre-judgment attachment, and hence Jaldhi's motion for counter-security must be denied.

Accordingly, the Court hereby (a) grants Jaldhi's motion to vacate that portion of the funds attached by SCI that consists of EFTs still en route to Jaldhi, stays the vacatur for 90 days, and certifies that portion of this Memorandum Order for interlocutory appeal; and (b) denies Jaldhi's motion for counter-security. The Clerk of the Court is directed to close document number 7 in the Court's docket.

SO ORDERED.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED NOVEMBER 20, 2006

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

06 Civ. 5507 (JSR)

SEAMAR SHIPPING CORPORATION,

Plaintiff,

-v.-

KREMIKOVTZI TRADE LTD. AND KREMIKOVTZI CORPORATION,

Defendants.

November 17, 2006, Decided
November 20, 2006, Filed

OPINION BY: JED S. RAKOFF

OPINION

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

By Order dated November 14, 2006, the Court granted the motion of intervenor GSHL Bulgaria S.A. ("GSHL") to vacate the Court's *Ex Parte* Order of

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Maritime Attachment, dated July 21, 2006, which restrained $ 243,004.87 in funds that were involved in an Electronic Funds Transfer ("EFT") routed through an intermediary bank in this District. This Opinion and Order will state the reasons for that determination and initiate further proceedings in this case.

For purposes of this motion, the pertinent facts are undisputed. Plaintiff Seamar Shipping Corporation is a company organized under the laws of Liberia and owner of the vessel M.V. Agios Raphael (the "Vessel"). Complaint P 2. By charter party dated February 11, 2004, plaintiff chartered the Vessel to defendants Kremikovtzi Trade Ltd. and Kremikovtzi Corporation (two Bulgarian companies here collectively called "Kremikovtzi") for the carriage of a cargo of bulk coal from Mobile to Bulgaria. *Id.* P 4. Although the Vessel completed its discharge at Bulgaria, plaintiff asserts that the Vessel was twice delayed — once while loading in Mobile and once while discharging in Bulgaria — and was thus on demurrage for some five days during the voyage. *Id.* PP 6-7. Plaintiff asserts that its total claim against Kremikovtzi is for $ 243,004.87. *Id.* P 12.

Plaintiff filed the instant action on July 21, 2006, together with an *ex parte* application for an order permitting it to attach any property held by Kremikovtzi in this District up to the sum of $ 243,004.87. In accordance with Rule B(1)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Admiralty

Rules"), the Order was granted subject to being thereafter contested by Kremikovtzi.[1]

The attached funds were part of an EFT of $ 1,213,989.92 from intervenor GSHL's account at The Bank of New York's London branch to another GSHL account at UBS Bank's branch in Lugano, Switzerland. Harter Aff. P 6. The transfer was denominated in United States Dollars and thus had to be routed through an intermediary bank in the United States. *Id.* P 7. The funds were routed through UBS's branch in New York, where the attachment occurred. *Id.*

On October 3, 2006, intervenor GSHL made a restricted appearance in the instant case, pursuant to Rule E(8) of the Admiralty Rules, to contest the attachment. GSHL argued that when The Bank of New York 's London branch issued transfer instructions for the EFT requested by GSHL, the instructions misstated the account holder at the receiving bank as being Kremikovtzi, rather than the actual holder, GSHL. Harter Aff. P 8. In addition, GSHL argued that the

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1. Additionally, in an action before Judge Marrero, *Phoenix Bulk Carriers Ltd. v. Kremikovtzi Trade Ltd.*, 05 Civ. 9559, plaintiff obtained an order attaching $ 883,717.24 of Kremikovtzi's funds, Affirmation of Simon Harter dated October 17, 2006 ("Harter Aff."), at PP 2, 4, and the plaintiffs in two other actions that were subsequently consolidated with *Phoenix Bulk — Fino Marine S.A. v. Kremikovtzi Trade Ltd* , 05 Civ. 10320 and *D'Amato Fratelli Spa v. Kremikovtzi Trade*, 05 Civ. 10585 — obtained attachments of those same funds in equal or lesser amounts. Harter Aff. P 3.

Court should vacate the attachment because, regardless of whether GSHL or Kremikovtzi was the intended beneficiary of the EFT, the funds were not the property of either party while in transit and thus were not subject to attachment under Admiralty Rule B(1)(a). It was on the basis of this latter argument that the Court granted the motion to vacate the attachment.

The analysis begins with the text of Rule B(1)(a), which permits attachment, where "a defendant is not found within the district," of "the defendant's tangible or intangible personal property," limited only by "the amount sued for." In order to attach an EFT under this rule, it must be both "tangible or intangible property" *and* "defendant's" property.

In *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 278 (2d Cir. 2002), the Court of Appeals stated that "EFT funds in the hands of an intermediary bank" qualify as "tangible or intangible property" subject to attachment under Rule B(1)(a). *Winter Storm* purported to ground this statement on "the broad, inclusive language of Admiralty Rule B(1)(a)," *id.*, and on the EFT analysis in *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), a civil forfeiture action under federal drug laws, in which the Second Circuit held that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statutes," 6 F.3d at 55.

The Second Circuit has not spoken with one voice, however, on whether an EFT in the hands of an

intermediary bank can be said to be a "defendant's" property, where the defendant is either the originator or the intended beneficiary of the EFT. In *Winter Storm*, the Court of Appeals did not address this question explicitly. Still, because *Winter Storm* instructed the district court to reinstate the attachment at issue, that decision has been construed to hold that the EFT at issue was the property of the defendant — who was the originator of the EFT, *see* 310 F.3d at 266 — under Rule B(1)(a). *See, e.g., HBC Hamburg Bulk Carriers GMBH & Co. KG v. Proteinas y Oleicos S.A. de C.V.*, 2005 U.S. Dist. LEXIS 8009, 2005 WL 1036127, at *4 (S.D.N.Y. 2005). However, in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006), the Second Circuit questioned the continued validity of *Winter Storm*'s implicit holding on this point:

> The correctness of our decision in *Winter Storm* seems open to question, especially its reliance on *Daccarett*, 6 F.3d at 55, to hold that EFTs are property of the beneficiary or sender of an EFT. Because *Daccarett* was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of *whose* assets they are while in transit. In the absence of a federal rule, we would normally look to state law, which in this case would be the New York codification of the Uniform Commercial Code, N.Y. U.C.C. Law §§ 4-A-502 to 504. Under state law, the EFT could not be attached because EFTs are property of neither the sender nor the

beneficiary while present in an intermediary bank. *Id.* §§ 4-A-502 cmt. 4 , 4-A-504 cmt. 1.

Aqua Stoli, 460 F.3d at 446 n.6 (emphasis in original). This footnote stops short of explicitly overruling *Winter Storm*, but nevertheless it raises a serious question of whether *Winter Storm*'s implicit holding that EFTs may be considered to be a defendant's property while in transit remains good law.[2]

Regardless of whether *Winter Storm* remains good law in general, there is a more narrow question at issue in this case: whether an EFT can be attached under

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2. Like other high authorities, the Court of Appeals sometimes moves in mysterious ways. While it has been said that the Court of Appeals "is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or [the Second Circuit Court of Appeals] *en banc*," *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986), *rev'd on other grounds*, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989), nevertheless, on occasion panels of the Second Circuit Court of Appeals have overruled prior decisions after providing notice either to the judges on the panels that issued the prior decisions, *see Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 & n.5 (2d Cir. 2005), or to all active members of the Court, *see Adeleke v. United States*, 355 F.3d 144, 155 & n.9 (2d Cir. 2004). The opinion in *Aqua Stoli*, however, does not appear to have been circulated to the panel that heard *Winter Storm*, and accordingly it may be doubtful whether *Aqua Stoli* could be considered to have overruled any part of *Winter Storm*. Yet the plain language in the above quoted passage in *Aqua Stoli* indicates that the decision in *Winter Storm* is now "open to question."

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Rule B(1)(a) where the defendant is the intended *beneficiary* of the EFT, rather than the originator. In reliance on *Winter Storm*, *Aqua Stoli* stated the broad rule that "EFTs *to or from* a party are attachable by a court as they pass through banks located in that court's jurisdiction." *Aqua Stoli*, 460 F.3d at 436 (emphasis added). This statement suggests that EFTs are attachable while in transit regardless of whether the defendant is the originator or the intended beneficiary of the EFT. In *Winter Storm*, however, the defendant was clearly the originator of the EFT, *see* 310 F.3d at 266, and in *Aqua Stoli*, although the attachment applied to EFTs "to or from" the defendant, neither the court nor the parties addressed whether the funds that were actually attached had been sent to or from the defendant, *see* 460 F.3d 434, 436. Thus, *Aqua Stoli*'s statement that "EFTs to or from a party are attachable by a court," if construed as binding law, would substantially broaden *Winter Storm*'s holding, which technically applies only where the defendant is the originator of the EFT.

Given that *Aqua Stoli* called *Winter Storm* into serious doubt, *see Aqua Stoli*, 460 F.3d at 446 n.6, it would be illogical to construe other statements in *Aqua Stoli* to broaden *Winter Storm*. To the contrary, taken as a whole, *Aqua Stoli* requires this Court to construe *Winter Storm* narrowly. Accordingly, *Winter Storm*'s [IIN2]holding that an EFT is the property of an originator while in transit does not imply a corollary rule that the

EFT is also the property of a beneficiary while in transit.[3]

In the instant case, Kremikovtzi is the purported beneficiary of the EFT. Accordingly, neither *Winter Storm* nor *Aqua Stoli* binds this Court in determining whether the instant attachment can stand. These cases do, however, provide meaningful guidance. Both cases provide that state law may be borrowed if there is no federal admiralty law in point on the particular question presented." *Winter Storm*, 310 F.3d at 275; *Aqua Stoli*, 460 F.3d at 446 n.6 ("[i]n the absence of a federal rule, we would normally look to state law"). The Second Circuit has held that looking to state law is "especially appropriate" where "precedent in federal admiralty law is . . . thin," and

> "a decision . . . contrary to the general rule of the state might have disruptive consequences for the state banking system." [*Det Bergenske Dampskibsselskab v. Sabre Shipping Corp.*, 341 F.2d 50, 52-53 (2d Cir. 1965)] (citation omitted). New York being the situs for multiple transactions in world commerce, the New York banking system is particularly vulnerable to such disruption.

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3. Although prior to the decision in *Aqua Stoli*, some courts in this District held, in reliance on *Winter Storm*, that EFTs in transit are attachable property belonging to the intended beneficiary, *see, e.g.*, *HBC Hamburg*, 2005 U.S. Dist. LEXIS 8009, 2005 WL 1036127, at *4, no court has so held since *Aqua Stoli* was decided.

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> Often, when a person in one foreign country makes a payment in U.S. dollars to someone in another foreign country, the payment clears through New York. . . . It is only appropriate therefore that we look to the New York law of attachment for guidance.

Reibor Int'l Ltd. v. Cargo Carriers (KACZ-CO.) Ltd., 759 F.2d 262, 266 (2d Cir. 1985).

In the absence of a federal rule governing whether an EFT is the property of an intended beneficiary while in transit, this Court will look to state law for guidance. *Aqua Stoli* identifies the applicable New York law as New York's codification of the Uniform Commercial Code. *See* 460 F.3d 434, at 446 n.6. The New York U.C.C. provides that "*until the funds transfer is completed* by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, *the beneficiary has no property interest in the funds transfer* which the beneficiary's creditor can reach." N.Y. U.C.C. § 4-A-502 cmt. 4 (emphasis added).

The EFT in this case had not been completed when it was attached at UBS's branch in New York, on its way to UBS's branch in Lugano, Switzerland. Harter Aff. PP 6-7. As a result, Kremikovtzi had no property interest in the attached ETF, as Admiralty Rule B(1)(a) requires. Accordingly, the Court, by the Order dated November 14, 2006, granted GSHL's motion to vacate the attachment.

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At the time of oral argument on this motion, counsel for plaintiff requested, in the event GSHL prevailed on its motion to vacate, that the Court certify the case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *See* Transcript, November 3, 2006, at 13. The determination here reached to vacate the attachment clearly "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b). Accordingly the Court hereby certifies this Opinion and Order, as well as the Order dated November 14, 2006, for interlocutory appeal.

Such an appeal, even if perfected, does not, however, stay further proceedings, if any, in the underlying case. To ascertain whether there are any such proceedings that must be addressed, the Court hereby orders counsel for each of the parties to jointly telephone Chambers by no later than November 22, 2006, so that the Court may determine how best to proceed.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York

November 17, 2006

APPENDIX D — RELEVANT RULES AND STATUTES

Federal Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, Rule B

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d)(i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

Appendix D

N.Y. U.C.C. § 4A-502(4) provides:

> Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

N.Y. U.C.C. § 4A-503 provides:

> For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

N.Y. U.C.C. § 4A-503.